IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T.

DURGA PRASAD SHARMA. V. DEVI PRAKASH & ANOTHER.

S. B. CIVIL SECOND APPEAL NO.221/96 against the judgment and decree dated 13.02.1996, passed by the Additional District Judge, Bikaner, in Civil Appeal No.41/94.

DATE OF JUDGMENT: ::: :16-05-2007

PRESENT

HON'BLE MR. JUSTICE PRAKASH TATIA

Mr.Sanjeev Sharma, for Appellant.
Mr.Vijay Bishnoi, for Respondent No.1.
Mr.A.K.Singh , for Respondent No.2.

BY THE COURT:

Heard learned counsel for the parties.

This appeal is against the judgment and decree of the two courts below dated 30th October, 1984, passed by the trial Court and appellate decree dated 13th February, 1986.The trial Court dismissed the suit of the plaintiff, filed for injunction against the

defendant respondent No.2 for restraining them from alienating the property in dispute to defendant respondent No.1.The suit was dismissed by the trial Court and the appeal was dismissed by the Appellate Court, therefore, this second appeal.

The following substantial question of law was framed by this Court, while admitting the appeal, on 2nd April, 2003 :-

> "Whether on an application for regularisation by the plaintiff in respect of a portion of road can debar him from challenging regularisation of a part of road in favour of defendant ?"

It will be relevant to mention here the facts of the case as pleaded by the plaintiff – appellant himself. The plaintiff claimed that the property situated in front of the house of the plaintiff was in possession of the plaintiff since the time of his ancestors since more than 50 years. He was using the said land as owner and, therefore, he became the owner of the property. In spite of said pleading, the plaintiff submitted that he applied for regularisation of the said piece of land before the Urban Improvement Trust, Bikaner (for short, 'UIT', Bikaner), upon which File No.79 dated 16th June, 2004 was opened. According to the plaintiff, the proceedings for regularisation of the land in favour of the plaintiff was going on and, during that period, the

new Trust was constituted, then the defendant no.1 got the land allotted in his favour. According to the plaintiff, since the land was inpossession of the plaintiff, therefore, it could not have been allotted to the defendant. He also pleaded that because of this allotment of land in favour of defendant No.1, the plaintiff's way will be obstructed and his front way will be adversely affected. On these grounds, the plaintiff filed a suit for injunction and sought a relief that the defendant No.2 be restrained from alienating the property in favour of defendant No.1.

The defendant No.1 filed detailed written statement and submitted that the plaintiff was never in possession of any part of the property, the land in question was the Government land and was available for allotment as a strip of land. The defendant submitted that he applied for allotment of land because the land was falling in front of the defendant's house. The defendant No.2 – UIT, Bikaner submitted written statement that the land in question is a part of the public street and the plaintiff could not have got the allotment of land in his favour or regularisation of the land from the UIT.

The trail Court, after considering the evidence of both the parties, observed that the land in question is open Government land and plaitnif also tried to get the land from the UIT, Bikaner.

Foundation of plantiff's claim was that he was in possesion of the land in dispute as owner. Then the plaintiff cannot say that the land in question was the land of way. The suit of the plaintiff was dismissed and the appeal was dismissed by the Appellate Court.

Learned counsel for the appellant vehemently submitted that even if the plaintiff applied for allotment of land and the regularisation of the land of way, even then, the plaintiff cannot be debarred from challenging the regularisation of land in favour of any other person, provided the land is part of public road. It is also submitted that the defendatn No.2 in their written statement clearly admitted that the land is part of way and that is a public way, therfore, the UIT could not have issued any Patta in favour of defendant of the land of road.

Learned counsel for the respondent No.1 pointed out that arguments advanced on behalf of the appellant plaintiff, is contrary to the plaitntiff's own case. The plaintiff's case is that the land is not the land of way, but this is the land which was in exclusive possession of the plaintiff himself. He claimed his right over the property because of his alleged old possession of 50 years. The plaintiff failed to prove the said plea and, thereafter, he wants to take the benefit of the admission of defendant No.2

UIT and not wants to use that admission against defendant No.1 which is not permissible at all. It is also submitted that from the evidence it is proved that the land is a strip of land and could have been allotted to any of the claimants. The very foundation of the suit of the plaintiff was not accepted by the two courts below and that question of fact cannot be interfered in the second appeal.

I considered the arugments of the learned counsel for the parties and perused the record also and particularly, the blue prints submitted before the trial Court of the property in dispute which are Exs. 2 and 6 respectively. It is clear from the facts in the plaint that entire case of the plaintiff is that the land in question was in his exclusive possession since last 50 years. The plaintiff never pleaded that the land in question was a land of public way or it was dedicated for that purpose, at any point of time. It is not a case where the plaintiff is challenging the alienation of the property by the UIT, Bikaner, to defendant No.1 on the ground that the land was not fit for allotment. The UIT's contention in the written statement, not supported by any evidence that the land in question was land of way, cannot be the basis of holding land in question to be land of way. It appears from the situation as is clear from two two maps that only a land which was in front of the house of the defendant No.1, was

sought to be regularised in favour of defendant No.1 by defendant No.2. Therefore, it is held that a person who himself applies for regularisation of the land and ultimately, it is found that land is a public way, then he is not debarred from challenging the allotment of the said land to any other person, but that plea is available when it is found that the land is a public way or part of public way. In the present case, this situation is not available and it is not proved that the land in question sought to be allotted in favour of defendant No.1, was ever land of any way, even of plaintiff's own way, much less to the claim of the land being land of public way.

In view of the above reasons, the appeal of the appellant is dismissed.

(PRAKASH TATIA), J.

scd.